International Association of Machinists and Aerospace Workers, District 190, Local Lodge 1414 *and* SSA Terminal, LLC and International Longshore and Warehouse Union, Local 10 and International Longshore and Warehouse Union, Local 75. Case 32–CD–163–1

June 30, 2005

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a proceeding under Section 10(k) of the National Labor Relations Act involving a purported jurisdictional dispute.[1] For the reasons discussed below, the National Labor Relations Board finds that the dispute here is a work preservation dispute and not a jurisdictional dispute subject to 10(k) proceedings. Accordingly, we shall quash the notice of hearing.[2]

On the entire record, the Board makes the following findings.

I. JURISDICTION

SSA is a Delaware corporation, with an office and place of business at the Port of Oakland in Oakland, California, where it is engaged in the business of cargo transportation and handling. During the 12-month period ending September 2004, it derived in excess of $50,000 in gross revenues from its operations. During this same period, SSA purchased and received goods and services valued in excess of $50,000 directly from suppliers located outside the state of California.

The parties stipulated, and we find, that SSA is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that IAM Local 1414 and ILWU Locals 10 and 75[3] are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background

SSA performs stevedoring services for its customers' shipping lines. Those services include the loading and unloading of cargo containers, most of which are refrigerated, shipped to and from the Port of Oakland. These cargo containers are placed in berths or terminals where they remain until they are picked up and transported to their final destinations. Refrigerated containers must be plugged into electrical service outlets when they arrive at a terminal and unplugged when they are moved. While they are staged within the terminal yards, they must be monitored to ensure that the refrigeration process is working properly and the contents are not spoiling. The plugging, unplugging, and monitoring work (also called "reefer" work) is the work in dispute.

SSA is a member of a multiemployer collective-bargaining organization called the Pacific Maritime Association (PMA). Through the PMA, SSA is signatory to a collective-bargaining agreement with the ILWU and its affiliated locals. ILWU Local 10 represents the employees performing longshoremen's work, including reefer work, under the terms of this agreement. SSA, through the PMA, is also signatory to a collective-bargaining agreement with the ILWU called the ILWU Watchmen's Agreement. Under that agreement, ILWU Local 75 represents SSA's watchmen employees who perform watchmen-security duties and reefer work. From 1980 to 2002, SSA and its predecessors at berths 67–68 (the Howard Terminal) performed stevedoring operations, including reefer work, for customers' shipping lines. During this period, the reefer work was assigned to and performed by employees represented by ILWU.

SSA is also signatory to a collective-bargaining agreement with IAM, under which IAM Local Lodge 1414 represents SSA's mechanical employees. In addition, in 1999, Matson Terminals subcontracted with SSA to perform its stevedoring and reefer work at berths 23 (YTI Terminal) and 32–34 (Matson Terminal). As a part of the subcontract, SSA agreed to abide by Matson's then-

[1] The charges were filed on September 30, 2004, by SSA Terminal, LLC (SSA), alleging that Respondent, International Association of Machinists and Aerospace Workers, District 190, Local Lodge 1414 violated Sec. 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing SSA to assign certain work to employees IAM Local 1414 represents rather than to employees represented by International Longshore and Warehouse Union Locals 10 and 75. A hearing was held on October 25, 2004, before Hearing Officer Valerie Hardy-Mahoney.

[2] At the hearing, the attorney for ILWU moved to quash the notice of hearing on the same ground. The hearing officer denied the motion, and ILWU argues that she erred in ruling on the motion. In accordance with Sec. 10214.4 and Sec. 10214.6 of the Board's Casehandling Manual, the hearing officer is responsible for developing a complete record and should make no recommendations or findings. Accordingly, the hearing officer should not have ruled on the ILWU's motion. See generally *Carpenters Local 558 (Joyce Bros. Storage)*, 331 NLRB 1022, 1023 (2002). We find, however, that the hearing officer's ruling did not materially affect the proceeding because the effect of her ruling was to allow the parties to proceed to the hearing and to develop a full record for the Board to adjudicate this dispute.

In all other respects, we affirm the hearing officer's rulings, finding them free from prejudicial error.

[3] As used below, "IAM" refers to Local Lodge 1414, and "ILWU" refers collectively to Locals 10 and 75.

existing collective-bargaining agreements with IAM and ILWU. At the Matson Terminal, IAM-represented employees performed the reefer work.

All of the current collective-bargaining agreements between SSA, IAM and ILWU Locals 10 and 75 contain detailed jurisdiction, work preservation, and grievance/arbitration provisions. The jurisdiction and work preservation clauses and provisions are broadly written. Most do not refer to any geographical scope, and those that do refer either explicitly or implicitly to the entire Bay Area. In any event, none of the collective-bargaining agreements refer to work performed at specific berths or terminals. For example, IAM's contract with SSA, section 1, "Employment," states, in part, that the "agreement shall cover all employees engaged in the repair and maintenance of automotive and electrical equipment . . . if employed by the Employer [and] if the work is done at the Employer's plants." Under section 2, "Subcontracting," subsection 2.2 states that "it is understood that employees represented by IAM will maintain and repair all equipment owned or leased by SSAT in the Greater San Francisco Bay Area." Further, subsection 2.3 states that "the Company agrees that the work which has been historically performed by the members of the bargaining unit will continue to be performed by the members of the bargaining unit, subject to the provisions of Section 1." Section 4, "Work assignment," provides that "during the term of the Agreement, the Employer shall continue to assign to employees covered hereby such work presently assigned them, which is controlled by and continues to be controlled by the Employer signatory hereto."

Likewise, in ILWU Local 10's contract with the PMA (the PMA Agreement), the "Scope of Agreement" states that "it is the intent of this contract agreement to preserve the existing work of such employees." Similarly, the "Recognition and Jurisdiction" clause in ILWU Local 75's agreement with the PMA provides that "the parties to the agreement shall use the ILWU Watchmen as in the past and as per agreement."

In 2002, SSA ceased its operations at Matson and Howard Terminals (some work was also moved from YTI) and consolidated its operations at berths 57–59 (the Super Terminal). The reefer work, including work on the Matson containers, was assigned to employees represented by ILWU. IAM filed a grievance over the reefer work assignment. On February 20, 2003, IAM Arbitrator Frank Souza awarded the reefer work at the Super Terminal to IAM-represented machinists who, he found, had historically performed the work. Subsequently, SSA filed a motion in Federal court to vacate the award on procedural grounds and continued to assign the reefer work to longshoremen represented by ILWU.[4]

In July 2004, SSA moved the majority of its operations, including most of the Matson containers that originated from Matson Terminal, from the Super Terminal to the Howard Terminal. It assigned the reefer work at that location to employees represented by IAM.[5] Thereafter, ILWU Local 75 filed a grievance regarding the assignment of the monitoring work.[6] On September 1, 2004, ILWU Arbitrator Gerald Sutliffe awarded the monitoring work to employees represented by ILWU Local 75 based on SSA's historical past practice at the Howard Terminal. Consequently, SSA reassigned the monitoring work to employees represented by Local 75. By letter dated September 13, 2004, IAM threatened SSA with economic action if SSA did not reassign the monitoring work back to IAM-represented employees.

B. Work in Dispute

The work in dispute is the monitoring, plugging and unplugging of refrigerated cargo containers (reefer work) for SSA at its Howard Terminal at the Port of Oakland, Oakland, California.[7]

C. Contentions of the Parties

ILWU moves to quash the notice of hearing, arguing that the dispute involves a work preservation claim on behalf of the longshoremen and watchmen whom it represents rather than the kind of jurisdictional dispute contemplated by Section 8(b)(4)(D) and 10(k) of the Act. ILWU contends that SSA created this dispute by assigning the reefer work at the Howard Terminal which historically and consistently had been performed by ILWU-represented longshoremen and watchmen to IAM-represented machinists in violation of the SSA/ILWU collective-bargaining agreements. ILWU further contends that SSA is now seeking to obtain a Board award confirming its right to assign the work to machinists while releasing SSA from its contractual obligations to ILWU. Therefore, it argues that SSA is not an "inno-

[4] At the time of the 10(k) hearing, this motion was still pending.

[5] SSA also moved the shipping of automobiles, which is a small part of its overall operation, from the Super Terminal back to Matson Terminal.

[6] ILWU Local 10 was not a party to ILWU Local 75's grievance. Therefore, only the issue of monitoring by ILWU Local 75-represented employees was before Arbitrator Sutliffe. However, ILWU Local 10 filed a separate grievance over SSA's assignment of the plugging and unplugging work at the Howard Terminal to IAM-represented employees. That grievance was pending at the time of the 10(k) hearing.

[7] The parties stipulated that they have resolved among themselves any disputes regarding the reefer work assignments at the Super Terminal, the YTI Terminal, and the Matson Terminal. They agree that what remains in dispute is the reefer work assignment at the Howard Terminal.

cent" employer caught between two rival unions claiming the same work, for which Congress intended to provide relief under Section 10(k). However, should the Board find that there is a valid jurisdictional dispute, ILWU alternatively contends that the Board should award the work to ILWU-represented longshoremen and watchmen on the basis of collective-bargaining agreements, area and industry practice, and the September 2004 arbitrator's award to ILWU Local 75.

SSA and IAM contend that a bona fide jurisdictional dispute is properly before the Board for resolution. They argue that the Board should award the work to IAM-represented machinists on the basis of employer preference and economy and efficiency of operations. SSA further argues that it assigned the reefer work to machinists based on equitable considerations, in that part of the disputed work involves the Matson containers, and reefer work on the Matson containers historically had been assigned to machinists before SSA moved to the Super Terminal. SSA also relies on the pending 2003 Souza award that assigned the reefer work at the Super Terminal, including the Matson containers, to IAM-represented employees. Accordingly, it argues that these factors favor an award to IAM-represented machinists.

D. Applicability of the Statute

In determining whether a jurisdictional dispute within the scope of Section 10(k) of the Act exists, the Board first determines whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This requires finding, inter alia, that a union has used proscribed means to enforce its claim to the work in dispute and that it had the proscribed objective of forcing an employer to assign the work to one group of employees rather than to another group of employees. See, e.g., *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002).

However, the Board also looks to the "real nature and origin of the dispute" in determining whether a jurisdictional dispute exists. *Teamsters Local 578 (USCP-Wesco*), 280 NLRB 818, 820 (1986), affd. sub nom. *USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987). In this regard, the Board has specifically held that if a dispute is fundamentally over the preservation, for one group of employees, of work they have historically performed, it is not a jurisdictional dispute. Thus, in *Wesco*, the Board held, inter alia, that Section 8(b)(4)(D) (and, implicitly, 10(k)) were "not designed to authorize the Board to arbitrate disputes between an employer and a union, particularly regarding the union's 'attempt to retrieve the jobs' of employees the employer chose to supplant by reallocating their work to others."[8] The Board reasoned that genuine work preservation clauses should be respected and protected: "Such provisions help maintain industrial peace, and the Board should not assert its jurisdiction in a manner which ensures that legitimate work preservation provisions would become unenforceable." 280 NLRB at 821. Further, in *Seafarers (Recon Refractory & Construction)*, 339 NLRB 825, 827 (2003), the Board stated that "[w]here a dispute is fundamentally one between an employer and a union, and concerns the union's attempt merely to preserve the work it previously had performed, the Board will not afford the employer the use of a 10(k) proceeding to resolve a dispute of its own making."[9] The Board held that the real dispute in that case was "a contractual dispute . . . over the preservation of bargaining unit work . . . [and that] [s]uch a work preservation dispute is not within the intended scope of Section 10(k) of the Act." Id. at 827.

In light of this precedent, we agree with ILWU that the real dispute in this case is a work preservation dispute over the reefer work performed at the Howard Terminal. It began when SSA assigned that work to IAM-represented machinists in July 2004. The record clearly establishes that only ILWU-represented longshoremen performed reefer work for SSA at the Howard Terminal before July 2004. The resulting dispute over the reefer work involved attempts by the ILWU Locals to recover and preserve work traditionally performed by employees whom they represent under their contracts with SSA. In these circumstances, we conclude that the dispute here was created by SSA's alleged breach of those contracts, and thus is a true work preservation dispute.

Machinists have also historically performed reefer work under their IAM contract with SSA, albeit not at the Howard Terminal, before July 2004. And since part of that work was for Matson Terminal, and part of the Matson Terminal work was transferred in 2004 to the Howard Terminal, IAM itself may have a colorable work preservation claim. However, a dispute does not lose its character as a work preservation dispute simply because more than one union may have a work preservation claim to the same work.[10]

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[8] 280 NLRB at 820, 821, citing *Longshoremen ILWU Local 26 (American Plant Protection)*, 210 NLRB 574, 576 (1984).

[9] See also *ILWU Local 62-B v. NLRB*, 781 F.2d 919 (D.C. Cir. 1986), in which the court denied enforcement of a Board order finding an 8(b)(4)(D) violation. The court noted that "[t]he dispute was entirely of the employer's making." 781 F.2d at 925.

[10] Chairman Battista does not pass on this conclusion. In his view, where two unions have valid work preservation claims, and one of the union engages in 8(b)(4) conduct to achieve its claim, Section 10(k) proceedings may be appropriate. However, in the instant case, the work in dispute is at the Howard terminal. The arbitrator found that

Therefore, we conclude that the evidence fails to establish a traditional jurisdictional dispute between two rival groups of employees claiming the same work, with an innocent employer caught in the middle. Rather, we conclude that SSA by its own unilateral actions—assigning to IAM-represented machinists work historically performed by ILWU-represented longshoremen—has created a work preservation dispute.[11] As such, it is not appropriate for resolution under Section 10(k).

ILWU Local 75 had historically performed the work at that terminal. Although IAM performed similar work for SSA in the past, it has not done so at Howard. Notwithstanding this, the Employer unilaterally assigned the work to employees represented by IAM.

Member Schaumber agrees that the present case is not a traditional jurisdictional dispute. In so finding, Member Schaumber emphasizes that he does not find or imply that SSA's conduct intentionally disregarded the provisions of the ILWU agreements or was culpably calculated to avoid its contractual obligations to the ILWU. However, as the Board has defined the work in dispute here, the ILWU's claim is one seeking to preserve that work and not one raising a jurisdictional dispute under Sec. 10(k).

ORDER

IT IS ORDERED that the notice of hearing issued in this case is quashed.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[11] See *Safeway Stores*, 134 NLRB 1320, 132 (1961) (distinguishing a jurisdictional dispute cognizable under Sec. 10(k) from a situation in which "the employer by his unilateral action *created* the dispute").